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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. DERREK TRIERWEILER, Defendant and Appellant.	D071316 (Super. Ct. No. SCD268204)

APPEAL from a judgment of the Superior Court of San Diego County, Laura W. Halgren, Judge. Affirmed.

Ashley N. Johndro, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Collette C. Cavalier and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Derrek Trierweiler was arrested after violating temporary restraining orders and made threats to a deputy while in custody. An information was filed charging him with

multiple counts, including threatening a public officer (Pen. Code, § 71.) He pled guilty to this count, in exchange for dismissal of the other counts. The trial court granted Trierweiler three years' probation and ordered him to serve 365 days in local custody. The probation conditions required him to, among other things, submit to searches of his computers and recordable media (the electronic search condition) and obtain approval of his residence and employment (the approval condition). On appeal, Trierweiler challenges the electronic search condition as unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*), and both conditions as unconstitutionally overbroad. We reject these contentions and affirm the judgment.

BACKGROUND[1]

Trierweiler's father had two temporary restraining orders against Trierweiler. Trierweiler went to his father's house, and, according to his father, had alcohol on his breath, pulled a hitching post out of the ground, and knocked off the mailbox. After Trierweiler refused to leave, his father called the police. San Diego County Sheriff's Deputy Jessica Boegler and another deputy responded and arrested Trierweiler. After being placed in the patrol car, Trierweiler was aggressive and uncooperative. He remained aggressive while in a holding cell at the station, was placed in maximum restraints, and said to nearby officers: "I got a .50 caliber and a bullet for each one of

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1 Because Trierweiler entered a guilty plea prior to trial, the following summary of the factual background is taken from the probation report and the reporter's transcript of the preliminary hearing and sentencing.

your heads on the force." As Deputy Boegler helped him into a car for transport to the county jail, he stated: "Fuck you, bitch. I know where your kid goes to school."

After Trierweiler pled guilty to threatening a public officer, the trial court granted three years' probation and imposed various conditions, including 6(n) and 10(g). Condition 6(n) provides that the defendant "[s]hall submit person, vehicle, residence, property, personal effects, computers, and recordable media to search at any time with or without a warrant, and with or without reasonable cause, when required by [a] P.O. or law enforcement officer." Condition 10(g) requires Trierweiler to "[o]btain P.O. approval" as to residence and employment. Other conditions include not using controlled substances without a valid prescription (and not using marijuana at all), and not using threats or violence. Defense counsel objected to condition 6(n), to the extent it covered electronic devices, based on a lack of nexus to the case. The court declined to modify the condition:

> "[T]his defendant's supervision and criminal activity goes back to 1999. To say he's been a difficult supervisee would be a bit of an understatement. He is what the research shows [is] a high-needs individual and will require a high degree of supervision. The defendant's crimes do span narcotics, violence, disobeying court orders, making criminal threats, and probation has to supervise the entire defendant not just the pieces of the defendant that committed this crime. [¶] This crime started with the defendant disobeying a restraining order, and probation would need to have access to the defendant's personal property through a Fourth waiver to insure no additional violations . . . certainly whether that's contained in physical form or in electronic form, it would be handcuffing probation's ability to supervise this defendant and giving him the services that he needs. . . . [A]wareness that probation may and will search your electronic communication devices will hopefully have a deterrent affect [sic] on the defendant to remain law abiding, . . . to avoid controlled substance activity that leads to bad decision making

> and criminal behavior. [¶] Were the court to prohibit probation from having the tools necessary to appropriately supervise the defendant, that would not be in the defendant's interest or society's, so those objections are overruled, and I cite the third factor of *Lent*."

The court stated it considered the probation report, and we briefly summarize relevant portions. With respect to Trierweiler's criminal history, the report reflected additional issues beyond those noted by the court, including (among many other things) methamphetamine possession and resisting and evading police. Trierweiler's own input reflected alcohol and marijuana use, as well as rare methamphetamine use. In addressing supervision, the report stated: "The defendant has had multiple grants of juvenile, summary, and formal probation since 1999. Records indicate a pattern of non-compliance throughout probation. The defendant has failed to attend scheduled appointments, provided positive drug tests, missed scheduled Court hearings, and continued to reoffend."

DISCUSSION

I.

General Principles

"In general, the courts are given broad discretion in fashioning terms of supervised release, in order to foster the reformation and rehabilitation of the offender, while protecting public safety." (*People v. Martinez* (2014) 226 Cal.App.4th 759, 764.)

Under *Lent*, a probation condition generally " 'will not be held invalid unless it "(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not

reasonably related to future criminality . . . . " [Citation.]' [Citation.] This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term." (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*), quoting *Lent*, *supra*, 15 Cal.3d at p. 486.)

" 'A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.' [Citation.] 'The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.' " (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346.)

"[W]e generally review the imposition of probation conditions for abuse of discretion, [and] we review constitutional challenges to probation conditions de novo." (*People v. Appleton* (2016) 245 Cal.App.4th 717, 723 (*Appleton*).)

"In general, the forfeiture rule applies in the context of sentencing as in other areas of criminal law." (*In re Sheena K.* (2007) 40 Cal.4th 875, 881 (*Sheena K.*).) There is an exception to this rule for a facial constitutional challenge; i.e., "a challenge to a term of probation on the ground of unconstitutional vagueness or overbreadth that is capable of correction without reference to the particular sentencing record developed in the trial court . . . ." (*Id.* at p. 887.)

II.

Electronic Search Condition

Trierweiler contends the electronic search condition was unreasonable under *Lent*, as well as unconstitutionally overbroad.[2]

We begin with *Lent*. Because the People do not address the first two prongs, we focus solely on the third and conclude the electronic search condition is reasonable. In *Olguin*, the California Supreme Court held a probation condition "that enables a probation officer to supervise his or her charges more effectively is . . . 'reasonably related to future criminality.' " (*Olguin, supra*, 45 Cal.4th at pp. 380-381.) In light of Trierweiler's lengthy criminal history and poor performance on probation, the trial court could find the electronic search condition would aid supervision and was reasonably related to deterring criminality. (See, *e.g.*, *In re J.E.* (2016) 1 Cal.App.5th 795, 797-798 801 (*J.E.*), review granted Oct. 12, 2016, S236628 [minor pled to second degree misdemeanor burglary and had history of drug use and gang ties; no abuse of discretion in imposing electronic search condition as "means of effectively supervising" minor with "constellation of issues requiring intensive supervision"].)

The underlying events here further support this conclusion. Trierweiler violated his father's restraining orders, threatened law enforcement, and stated he knew where an

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2 Several cases regarding electronic search conditions are pending before the California Supreme Court. (See *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923.) We address certain of these decisions, *post*. We also note Trierweiler does not contend the search condition terms here are vague, and appears to contemplate they encompass cell phones and social media. Solely for purposes of this appeal, we assume that is the case.

officer's child attended school. Providing access to his devices could disclose if he is searching for these individuals—and, perhaps, dissuade him from doing so in the first place. It will also aid supervision of his other probation conditions, including limitations on drug use. (See *In re P.O.* (2016) 246 Cal.App.4th 288, 291, 295 (*P.O.*) [minor admitted to public intoxication following incident with drugs; applying *Olguin* to conclude electronic search condition reasonably related to future criminality and explaining officers could review "electronic activity for indications that [he] has drugs or is otherwise engaged in activity in violation of his probation"]; *In re George F.* (2016) 248 Cal.App.4th 734, 740-741, review granted Sept. 14, 2016, S236397 [accord].)[3]

We disagree this case is governed by those decisions, including *In re Erica R.* (2015) 240 Cal.App.4th 907 (*Erica R.*) and *In re J.B.* (2015) 242 Cal.App.4th 749 (*J.B.*), which suggest the defendant must have used or be likely to use electronic devices in criminal activity for an electronic search condition to relate to future criminality. (*Erica R.*, at pp. 907, 913 [minor admitted possession of Ecstasy; no reasonable relation to future criminality, where neither offense, nor social history, connected electronic devices or social media to drugs]; *J.B.*, at pp. 752, 756 [minor admitted petty theft and had used marijuana in the past; accord.].) Although not every condition that may aid supervision necessarily will be reasonable, *Olguin* does not require that the supervision method relate

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3 On reply, Trierweiler suggests that *J.E.*, *P.O.*, and *George F.* are distinguishable because they involve minors. But he himself relies on cases involving minors, and argued in his opening brief that "[t]heir reasoning applies with equal force to adult probationers." Much of the reasoning in these cases is generally applicable, and we rely on them to extent pertinent here.

to the defendant's past criminal conduct. In addition, both *J.B.* and *Erica R.* involved minors with apparently limited records, not an adult repeat offender with a history of probation noncompliance. We conclude the electronic search condition reasonably relates to deterring future criminality here.

Turning to overbreadth, we must first address whether Trierweiler forfeited this issue by failing to raise it below. We conclude he did. He does state the electronic search condition is overbroad on its face (citing *Riley v. California* (2014) 134 S.Ct. 2473, 2488-2489 (*Riley*)), and that we need not look at the trial record to resolve the issue. But the substance of his argument is that "electronic search conditions like the one at issue here must be narrowly tailored" and "Appellant's electronic search condition simply is not." Because this challenge depends on the trial record, we conclude he has forfeited it. (See *Sheena K.*, *supra*, 40 Cal.4th at p. 881.)

In any event, Trierweiler has not established the electronic search condition is unconstitutionally overbroad. The record reflects a legitimate purpose for the condition: preventing criminal activity by facilitating supervision, for an individual with a long criminal history and previous failures to comply with probation. Trierweiler does not dispute this purpose, but rather contends it is "heavily outweighed" by his privacy rights. We disagree. Although the condition may implicate Trierweiler's right to privacy, that right is diminished while he is on probation. (See *People v. Nachbar* (2016) 3 Cal.App.5th 1122, 1129, review granted Dec. 14, 2016, S238210 [declining to find electronic search condition overbroad; noting defendant who accepts probation "has a diminished expectation of privacy as compared to law-abiding citizens"].) Moreover, he

does not establish what devices he possesses or how his privacy would be impacted, and the record is devoid of evidence on the issue. (See *J.E., supra*, 1 Cal.App.5th at p. 806 ["Nothing in the record shows Minor even has a cell phone or any electronic devices, and Minor does not point us to anything in the record showing any actual harms stemming from their inspection."].)

Given the legitimate purpose of the electronic search condition and Trierweiler's diminished privacy expectations (as well as his failure to establish specific concerns), we conclude the condition is not overbroad. (See, *e.g., J.E., supra*, 1 Cal.App.5th at pp. 799, 806 [concluding electronic search condition was not overbroad; explaining the "collective circumstances justif[ied] . . . imposition of a broad electronic search condition as a means of adequately supervising Minor's compliance with his probation conditions and protect[ing] the public, as well as Minor, from Minor's future criminality. Moreover, given Minor's limited reasonable expectation of privacy, the intrusion into Minor's right to privacy is outweighed by the state's interest in ensuring his rehabilitation."].)

Trierweiler's argument that the electronic search condition necessarily implicates his Fourth Amendment rights and right to privacy lacks merit. In *Riley*, the United States Supreme Court found warrantless cell phone searches implicated Fourth Amendment rights, and emphasized the extent of personal information found on modern phones. (*Riley, supra*, S.Ct. 2473 at pp. 2489-2493.) But the privacy concerns expressed in *Riley* are inapposite here, where there is a legitimate basis for a waiver of Fourth Amendment rights. (See *J.E., supra*, 1 Cal.App.5th at pp. 803-804 [finding *Riley* inapposite to constitutionality of probation conditions allowing searches of electronic devices;

explaining, in part, that unlike the suspect in *Riley*, who was still presumed innocent, probationer may be subjected to " 'reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens' "].) In turn, Trierweiler's reliance on *Appleton* and *P.O.* is misplaced. *Appleton* relied on *Riley* to conclude an electronic search condition was overbroad, and *P.O.* reached the same result by relying, in part, on *Appleton*. (*Appleton, supra*, 245 Cal.App.4th at pp. 725, 727; *P.O., supra*, 246 Cal.App.4th at p. 298.) *Appleton* and *P.O.* also are inapposite, because they involve situations where more limited restrictions were sufficient.[4] No such limitation is warranted here.

III.

Approval Condition

Trierweiler also challenges the residence and employment approval condition on overbreadth grounds. Again, we begin with forfeiture, and conclude he has forfeited the issue. He contends the condition is overbroad on its face, but his arguments are specific to himself and the record; he claims the condition is "not narrowly tailored to protect appellant's important constitutional rights"; the underlying offense did not occur while he was at work; and, on reply, that his personal circumstances would make it difficult to find

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4 See *Appleton, supra*, 245 Cal.App.4th at pages 719 and 727 (defendant pled no contest to false imprisonment by means of deceit, following alleged forced copulation with victim he met online; describing state's interest as "monitoring whether [he] uses social media to contact minors for unlawful purposes") and *P.O., supra*, 246 Cal.App.4th at pages 291 and 300 (minor admitted to public intoxication after incident involving drugs; modifying condition to allow for search of " 'any medium of communication reasonably likely to reveal whether [he was] boasting about [his] drug use or otherwise involved with drugs.' ").

a residence that would satisfy the probation officer and permit him to continue working in San Diego. These arguments require review of the trial record, and forfeiture applies. (*Sheena K.*, *supra*, 40 Cal.4th at p. 881.)

Trierweiler has not established overbreadth, regardless. Although the trial court did not address the approval condition (as he failed to object), we can infer it has a legitimate purpose akin to the electronic search condition: to deter future criminality via supervision. Given Trierweiler's history, awareness of his residence and workplace are relevant to this purpose, and the limited imposition of an approval requirement is reasonable. (See *People v. Stapleton* (2017) 9 Cal.App.5th 989, 995 (*Stapleton*) [affirming residence approval following plea to petty theft with a prior; noting criminal history and substance abuse, among other issues, and explaining "[a] probation officer supervising a person like defendant must reasonably know where he resides and with whom he is associating in deterring future criminality. [¶] . . . The nature of defendant's crime and criminal history suggests a need for oversight."].) For example, it could be pertinent to Trierweiler's supervision if he sought to live or work near his father, or officers to whom he made threats. His drug use warrants similar oversight, as drugs may be associated with particular areas or available in certain workplaces. We reject his claim that the conditions "could allow probation to bar [him] from residing in his home or neighborhood and . . . prohibit him from obtaining employment," and find his concerns about satisfying the probation officer unfounded. There is nothing in the record to show the probation officer would abuse the approval condition, and it would be impermissible

if he or she did. (See *Stapleton*, at p. 996 [probation officer "cannot use the residence condition to arbitrarily disapprove a defendant's place of residence"].)

The authorities cited by Trierweiler do not warrant a different result. In *People v. Bauer* (1989) 211 Cal.App.3d 937, the Court of Appeal struck a residence approval condition for a defendant who lived with his parents, noting it gave the "probation officer the discretionary power, for example, to forbid appellant from living with or near his parents—that is, the power to banish him." (*Id.* at p. 944.) But here, there is nothing to suggest the approval condition was "designed to banish defendant or to prevent him from living where he pleases." (*Stapleton*, *supra*, 9 Cal.App.5th at p. 995 [distinguishing *Bauer*, whose restriction it described as "apparently designed to prevent the defendant from living with his overprotective parents"].) In *People v. Burden* (1988) 205 Cal.App.3d 1277 (*Burden*), a salesperson pled guilty to writing bad checks, a probation condition barred him from work in outside or commissioned sales, and we reversed. (*Id.* at p. 1279.) We explained that a condition relating to employment "must be 'necessary to serve the dual purpose of rehabilitation and public safety' " and the condition there was an "unnecessary infringement on [the defendant's] right to work." (*Id*. at p. 1281.)[5] Here, the condition will facilitate Trierweiler's supervision and rehabilitation, and he is not

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5 Trierweiler also suggests an employment condition "must relate to the crime," citing *Burden*. But he is quoting from the court's discussion of *Lent*, and he did not object under *Lent* here. (*Burden*, *supra*, 205 Cal.App.3d at pp. 1279-1280.) We further note *Burden* preceded *Olguin* and its *Lent* analysis relating to supervision.

prohibited from working in a particular industry or job. He merely needs to obtain approval and, again, there is nothing to suggest it will be arbitrarily withheld.[6]

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

I CONCUR:

HALLER, J.

I CONCUR IN THE RESULT:

IRION, J.

[6] On reply, Trierweiler requests this court at least modify the condition to require notification, rather than approval. He did not raise this issue below or in his opening brief, and we need not address it. (*People v. Zamudio* (2008) 43 Cal.4th 327, 353 [" 'Normally, a contention may not be raised for the first time in a reply brief.' "].) At any rate, given his history of noncompliance while on probation, an approval requirement remains suitable here.